U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 20Aug2001

CASE NO.: 2001 AIR 3

In the Matter of

WILLIAM H. PECK
Complainant

v.

ISLAND EXPRESS
Respondent

APPEARANCES: Mr. William Peck, *Pro Se*

Mr. Brian Kopelowiz, Attorney
For the Respondent

Ms. Krista M. Fox, Attorney
For the Federal Aviation Administration

BEFORE: Richard T. Stansell-Gamm
Administrative Law Judge

ORDER - DENIAL OF MOTION TO QUASH SUBPOENA

On June 25, 2001, I received this case from the Chief Administrative Law Judge, Office of Administrative Law Judges ("OALJ"), U.S. Department of Labor ("DOL") to conduct a hearing under Section 519 of the Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, Subsection 42121 (b) (2) (A) ("AIR 21"), based on the timely hearing request by Mr. Peck who objected to the findings of the investigation by the Occupational Health and Safety Administration into his discrimination complaint. The hearing is presently scheduled for September 20, 2001 in Fort Lauderdale, Florida.[1]

In preparation for the hearing, Mr. Peck requested from OALJ several subpoenas, signed by the Chief Administrative Law Judge, for service upon numerous witnesses. On July 25, 2001, Mr. Peck sent one of the subpoenas to Ms. Jean Ferrara of the Federal Aviation Administration ("FAA"). On August 6, 2001, I received from Ms. Fox, counsel for the FAA, a Motion to Quash Subpoena

[1] Amended Notice of Hearing, dated August 7, 2001.

Directed to Jean Ferrara.[2] Mr. Peck responded on August 9, 2001, requesting that the motion be denied. Mr. Kopelowiz did not reply to the motion.

Parties' Positions

According to its regulations, the FAA does not permit its employees to testify in proceedings involving private litigants unless the request for testimony or documents is submitted in accordance with 49 C.F.R. Part 9. Under this provision, the request for testimony and documents is sent to the FAA General Counsel who determines whether the FAA will produce the requested documents and permit the requested individual to testify. Since Mr. Peck's subpoena does not comply with those regulatory provisions, the FAA seeks to quash the subpoena of Ms. Ferrara, who is an FAA aviation safety inspector in Fort Lauderdale, Florida. Mr. Peck had been informed of the proper procedures but did not comply.

Mr. Peck requests that the Motion to Quash the subpoena be denied. He asserts that Ms. Ferrara's testimony is directly related to her investigation of Island Express and his relationship with the FAA and Island Express. Without Ms. Ferrara, Mr. Peck will be at a "great disadvantage" because her testimony is the only way he can challenge Island Express' responses to the OSHA investigation. Mr. Peck stresses that the whistle blower provision of AIR 21 provide little protection if an employee is unable to obtain facts that may be in the possession of the FAA.

Discussion

When Congress directs DOL to conduct a formal adversarial adjudication to be determined on the record after the parties have an opportunity for an administrative hearing in accordance with the Administrative Procedures Act ("APA"), the procedural rules for the Office of Administrative Law Judges are applicable to such hearing. *See* 5 U.S.C. 554, 556, and 557, and 29 C.F.R. § 18.1101 (a) (1). Within those procedural rules, 29 C.F.R. §18.24 governs the issuance of administrative subpoenas. According to this regulation, the Chief Administrative Law Judge, or the presiding administrative law judge, may issue a subpoena, as appropriate, and as authorized by statute or law, upon the written application of a party requiring the attendance of a witness. 29 C.F.R. § 18.24 (a).

The essential inquiry in considering this motion is whether the Chief Administrative Law Judge had the authority, either by statute or law, to issue the subpoena to Ms. Ferrara on Mr. Peck's behalf. Since AIR 21 did not expressly give administrative law judges such subpoena power, the subpoena will stand only if by operation of law, authority for an administrative subpoena exists for hearings conducted under AIR 21.

The subject of administrative subpoenas has recently generated quite a legal debate within DOL. For several years, based on a 1994 decision by the Secretary of Labor ("Secretary"), *Malpass*

[2]Ms. Ferrara has not personally opposed the subpoena.

v. General Electric, Nos. 85-ERA-38 & 39 (Sec'y Mar. 1, 1994) the Administrative Review Board ("ARB" or "Board")[3] had maintained that administrative subpoenas were not available in administrative whistle blower hearings brought under the Energy Reorganization Act ("ERA").[4] However, in *Childers v. Carolina Power & Light Co.*, ARB Case No. 98-77, ALJ Case No. 97-ERA-32 (ARB Dec. 29, 2000), the ARB reversed the *Malpass* holding and concluded that ERA implicitly provided administrative law judges with subpoena power.[5] After acknowledging the absence of explicit delegated subpoena power in the ERA whistle blower protection provision, the ARB rejected the requirement for "express authorization." Because the whistle blower provision required DOL to issue an adjudicative order on the record, the ARB pointed to decisions within the federal court system implying support for the use of administrative subpoenas in those situations.[6]

Turning to the provisions of the Administrative Procedures Act that permit agencies to issue subpoenas "as authorized by law," 5 U.S.C. §§ 555 (d) and 556 (c)(2), and disagreeing with another federal court,[7] the Board found that "authorized by law" did not mean the same thing as "express authorization." In other words, the ability to issue an administrative subpoena, even absent express statutory authorization, exists under the APA if the subpoena relates to the statute's underlying purpose, is reasonably specific, and not unreasonably burdensome. The ARB observed:

> [A]dministrative subpoenas have been a staple of federal legislation and agency practice for more than a hundred years. To infer subpoena power from statutory authorization to investigate and enforce compliance with a statute produces anything but a departure from the legal norm. To the contrary, application of the express authorization rule would produce an anomalous result by depriving the agency of an essential and commonplace mechanism for effectuating its duty to assure compliance with the statute.

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[3]On April 17, 1996, the Secretary issued Secretary Order 2-96 which established the ARB and delegated to the ARB, in part, the authority and responsibility to act for the Secretary in issuing final decisions on questions of law and fact and to review recommended decisions and orders in various environmental whistle blower cases.

[4]In a manner similar to Section 42121 of AIR 21, Section 5851 of the ERA, 42 U.S.C. § 5851, provides a remedy for employees in the nuclear power industry who suffer employment discrimination because they complain about unsafe conditions.

[5]Although concurring with the other two board members that the ERA implicitly empowered an administrative law judge with subpoena power, one member of the ARB, contrary to the majority opinion, believed a remand was necessary in order that the complainant be given an opportunity to demonstrate why his requested witness subpoena was necessary.

[6]*Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980), *Deviny v. Campbell*, 194 F.2d 876, 879-880 (D.C. Cir.), *cert. denied* 344 U.S. 826 (1952), and *Atlantic Richfield Co. v. DOE*, 769 F.2d 771, 795 (D.C. Cir. 1984).

[7]*Immanuel v. United States Dep't Labor*, 139 F.3d 889 (unpublished table decision) (4th Cir. 1998), 1998 WL 129932.

After the ARB's decision in *Childers*, the issue of administrative subpoenas in whistle blower cases seem to be resolved. However, in July 2001, the Solicitor for DOL found the ARB's reasoning "erroneous" and its dictum "legally indefensible." According to the Solicitor's directive, the agency should resist complying with subpoenas not specifically authorized by statute in whistle blower cases.

This collision between the Secretary's delegated decision authority and her chief counsel on whistle blower cases certainly seems to muddy the water. However, because my recommended decision and order is reviewed by the ARB and not the Solicitor, I consider the ARB's conclusion that administrative subpoena power is applicable in whistle blower cases to be my guiding principle. And, since I concur with the ARB's legal analysis (even though considered "indefensible" in some quarters), I have no inclination to reach a decision in the Motion to Quash Subpoena before me that is contrary to either the letter or spirit of the ARB's decision in *Childers*.

Having determined that authority for subpoena power does exist in this case, I next turn to the specifics of Mr. Peck's subpoena of Ms. Ferrara to evaluate whether issuance of the subpoena was warranted. For two reasons set out below, I find Ms. Ferrara's testimony is critical to the adjudication of Mr. Peck's complaint and that her participation furthers the purpose of the whistle blower provisions in AIR 21.

First, Ms. Ferrara's testimony is important in this proceeding due to the analytical structure of deciding the validity of a whistle blower case. In the absence of direct evidence, or an admission, of a discriminatory or punitive purpose to the adverse action, a whistle blower complainant may establish that a protected activity (see Section 42121 (a) (1) to (4)) likely motivated the adverse employment action, such as a discharge, by showing (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Byrd v. Consolidated Motor Freight*, 97-STA-9 @ 4-5 (ARB May 5, 1998) and *Kahn v. United States Sec'y of Labor*, 64 F. 3d 261, 277 (7th Cir. 1995). Ms. Ferrara, as Mr. Peck's contact at the FAA, has knowledge about the circumstances of the FAA audit and the extent of communication between the FAA and Island Express concerning the basis for the audit. Her testimony goes directly to the issue of whether Island Express was aware of Mr. Peck's protected activity under AIR 21. Clearly, the participation of an FAA employee in this situation is necessary.

Second, Ms. Ferrara will be able to present the results of the FAA so that I may consider whether Mr. Peck's discrimination complaint was frivolous or brought in bad faith

Besides possessing relevant information in this case, Ms. Ferrara is a federal employee with the FAA assigned in the Fort Lauderdale community. Her attendance at a hearing conducted in that city does not appear to be unduly burdensome nor expensive. In addition, the focus of Mr. Peck's subpoena is sufficiently specific in that it requires her testimony, and the production of documents, concerning the circumstances of the FAA's audit of Island Express.

Conclusion

The subpoena furthers the purpose of the whistle blower provisions of AIR 21 in that Ms. Ferrara's testimony, and associated documents, relate to essential elements of Mr. Peck's employment discrimination complaint. The subpoena is reasonably specific and not unreasonably burdensome. Accordingly, I find the administrative subpoena of Ms. Jean Ferrara of the FAA is appropriate and the Motion to Quash Subpoena must be denied.

Additional Comment

The FAA's resistance to the subpoena is disturbing. The purpose of AIR 21, which Congress placed within legislation directly affecting the FAA, was clearly to encourage individuals to report perceived aviation safety hazards to the FAA. By providing an employment protection umbrella, Congress sought to assure aviation safety whistle blowers that their employment would not be jeopardized by bringing non-frivolous complaints of aviation safety deficiencies to the attention of the FAA. Imagine the subsequent surprise of these individuals when they attempt to open this protection and discover it is full of holes because the FAA refuses to provide witnesses, and documents, essential to the whistle blowers' efforts to prove their employment discrimination complaints.

ORDER

1. The Motion to Quash Subpoena Directed to Ms. Jean Ferrara is **DENIED**.

2. I **ORDER** Ms. Jean Ferrara to comply with the subpoena and appear at the hearing before me, with the requested documents, at the following date, time and location:

THURSDAY, SEPTEMBER 20, 2001
9:00 a.m.

Federal Courthouse
299 East Broward Blvd.
Room 101
Fort Lauderdale, FL 33301

If Ms. Ferrara fails to appear at the specified date, time, and place, or attends the hearing but refuses to testify and produce the requested documents, I will give Mr. Peck the opportunity to request a continuance in order that he may apply to the appropriate federal district court for enforcement of this order.[8]

SO ORDERED:

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RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: August 20, 2001
Washington, D.C.

[8]Prior to the scheduled hearing, Mr. Peck may, but is not required to, avert the legal confrontation by applying, as indicated in Ms. Fox's Motion to Quash Subpoena and 49 C.F.R. Part 49, to the FAA General Counsel for permission to have Ms. Ferrara testify at the hearing and produce the requested documents.